



June 24, 2002

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2002-3408

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164717.

The Texas Department of Transportation (the “department”) received a request for a list of applicants, the successful applicant’s application, interview questions and their preferred answers, and a copy of the job simulation exercise for the successful applicant and the requestor regarding a specified job vacancy. You state that you will release most of the responsive information to the requestor. However, you claim that the job simulation exercise and some information on the job application and list of applicants are excepted from disclosure under sections 552.101, 552.117, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term “test item” in section 552.122 includes any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee’s overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994).

You contend that the submitted job simulation exercise, Exhibit B, is excepted from disclosure under section 552.122(b) of the Government Code. You state that the job simulation exercise involves "standards by which an individual's knowledge and ability in a particular area is evaluated" and that the department "anticipates using this job simulation exercise for future job vacancies of this kind." You further state that the performance criteria are "an integral part of the job simulation exercise itself and also reveal the nature of the exercise." Having considered your arguments, we agree that the job simulation exercise constitutes a "test item" as contemplated by section 552.122(b). We also find that the performance criteria may reveal the job simulation exercise itself. Accordingly, the department may withhold the job simulation exercise and the performance criteria in Exhibit B pursuant to section 552.122(b) of the Government Code.

You claim that the bracketed information in Exhibits C and E is excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code § 552.117(1)*. However, information subject to section 552.117(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*.

You have submitted to our office a form, Exhibit D, which reflects that the employee in question requested that his home address and telephone number, social security number, and family member information be kept confidential. However, it appears from our review of the documents, that the employee in question is a newly hired employee of the department. The employee began his employment with the department on April 17, 2002. The current request for information was received by the department on April 10, 2002. As the newly hired employee was not an employee of the department at the time that the department received the request for information, section 552.117 is inapplicable to this employee and this information must be released, except for the employee's social security number.

You have also marked social security numbers in the submitted documents. Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. Section 552.101 encompasses information made confidential by other statutes. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See Open Records Decision No. 622 (1994)*. These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any

provision of law enacted on or after October 1, 1990. *See id.* You claim that subsection 653a(b)(1)(A) of title 42 of the United States Code is such a law. This statute requires an employer to furnish to the Directory of New Hires of the state in which the newly hired employee works, a report that includes the employee's social security number. Thus, we agree that the statute regulates the department's obtaining or maintaining social security numbers. *See* 42 U.S.C.A. § 653a(a)(2)(B), (b)(1)(A). We therefore conclude that the social security numbers in Exhibits C and E are confidential under section 405(c)(2)(C)(viii)(I), and thus, excepted from public disclosure under section 552.101 on the basis of that federal provision.

You have marked Texas driver's license information in Exhibit C that is subject to section 552.130 of the Government Code. Section 552.130 excepts information from disclosure that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, the department must withhold the Texas driver's license number and commercial driver's license information in Exhibit C pursuant to section 552.130 of the Government Code.

Finally, we note that Exhibit C contains an e-mail address obtained from the public that is excepted from public disclosure. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Accordingly, as there is no indication that there has been consent to any release, the department must withhold the e-mail address we have marked under section 552.137 of the Government Code.

In summary, we conclude that: 1) the department may withhold the job simulation exercise and corresponding performance criteria in Exhibit B pursuant to section 552.122(b) of the Government Code; 2) the marked social security numbers in Exhibits C and E are confidential and excepted from public disclosure under section 552.101 of the Government Code; 3) the department must withhold the marked Texas driver's license number and commercial driver's license information in Exhibit C pursuant to section 552.130 of the Government Code; and 4) the department must withhold the e-mail address in Exhibit C under section 552.137 of the Government Code. All remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "W. Montgomery Meitler". The signature is written in a cursive, slightly slanted style.

W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/sdk

Ref: ID# 164717

Enc: Submitted documents

c: Ms. Bettye J. Taylor
3004 Susquehanna Lane
Austin, Texas 78723-2314
(w/o enclosures)